95-1102

No. _____

Supreme
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In The

Supreme Court of the United States

October Term, 1995

FGS CONSTRUCTORS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA, MICHAEL CARLOW, d/b/a, CARLOW ENTERPRISES, CAROLE OBERLITNER, CARL OBERLITNER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify whether Congress intended its amendment of 25 U.S.C. 450f by P.L. 101-512 to extend liability protection of the United States to "Indian contractors" performing Indian Self-Determination and Education Assistance Act (ISDEAA) contracts or whether FTCA protection is limited only to "tribal organizations" which may themselves be a party to ISDEAA contracts as defined by 25 U.S.C. 450b(j).

2. Certiorari should be granted to clarify whether by modification of an ISDEAA contract by the Bureau of Indian Affairs to include an engineering contract, liability of the United States is extended to protect employees of the engineer under 25 U.S.C. 450f, as amended, and the FTCA.

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OPINIONS BELOW

On September 5, 1995, the United States Court of Appeals for the Eighth Circuit issued its opinion, affirming the decision of the District Court of the District of South Dakota dated November 21, 1994. The Opinion of the Court of Appeals has been published at 64 F.3d 1230 (8th Cir. 1995) (1a-12a). The District Court's Memorandum Opinion has not been published. (13a-26a).

STATEMENT OF JURISDICTION

Petitioner seeks review of an opinion of the United States Court of Appeals for the Eighth Circuit and its Judgment of September 5, 1995. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. 1254(1).

STATUTE INVOLVED

P.L. 101-512, amending U.S.C. 450f, states in pertinent part:

> With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 30, 1990 but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.)[Pub.L. 93-638, Jan. 4, 1975, 88 Stat. 2203] or

by Title V, part B, Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1968, as amended (102) Stat. 385, 25 U.S.C. 2501 et seq. (Pub.L 100-297, Title V, Part B, Apr. 28, 1988, 102 Stat. 385, known as the "Tribally Controlled Schools Act of 1988", which is classified to Chapter 27, section 2501 et seq., of this title), an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of Interior of the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act [Act Aug. 2, 1946, c. 753, Title IV, 60 Stat. 842]; *Provided further*, That beginning with the fiscal year ending September 30, 1991, and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions; *Provided further*, That nothing in this section shall in any way affect the provisions of section 102(d) of the

Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.)[subsec. (d) of this section].

Historical and Statutory Notes for 25 U.S.C. 450f; Pub.L. 101-512, Title III, Sec. 314, Nov. 5, 1990, 104 Stat. 1959, as amended Pub.L. 103-138, Title III, Sec. 308, Nov. 11, 1993, 107 Stat. 1416.

STATEMENT OF THE CASE

In 1991 the Aberdeen Area Office of the United States Bureau of Indian Affairs (BIA) entered into a Self-Determination Contract with the Oglala Sioux Tribe (Tribe), pursuant to P.L. 93-638, the Indian Self-Determination and Education and Assistance Act (ISDEAA), 25 U.S.C. 450 et seq. The Contract was for the federal supervision and funding of necessary re-construction work on the White Clay Dam, upstream from the town of Pine Ridge, on the Pine Ridge Indian Reservation. The federal project was a product of the National Dam Inspection Act [33 U.S.C. 467, et seq., as amended] and a Presidential Memorandum dated April 23, 1977 (regarding dam safety).

Under the Self-Determination Contract (ISDEAA Contract or Contract), the Tribe was to "consult, communicate and coordinate on relevant matters" with the BIA. "[A]ll reports, studies, analyses, and plans" had to be submitted to the BIA and the Bureau of Reclamation (BOR) "for review and comment, plus required approvals". The ISDEAA Contract required the BIA: have final approval or disapproval over acquisition actions

involving consulting services; be involved in the development and submission of any proposed contract modifications, and make necessary changes therein; issue all contracts and sub-contracts for the Project; and have final approval of any "contract modification request to make the contract/subcontract a part of the prime contract".

The record shows permanent employees of the BIA exercised this authority, and were involved in inspections, decisions, and meetings regarding the contract-work from the beginning of the construction project.

Consistent with the purposes of the ISDEAA, the Tribe and BIA sought and hired Indian contractors to perform the engineering and construction tasks of the ISDEAA Contract. An Engineering Contract was executed between Cooper Consultants, Inc. (CCI), a 100% Indian owned corporation from Oregon and the Tribe, followed by a Construction Contract between the Tribe and Indian Contractor, Michael Carlow, d/b/a Carlow Enterprises (Carlow). To qualify for its contract, Carlow had to obtain performance and payment bonds in compliance with the Federal Acquisition Regulations (FAR). Carl and Carole Oberlitner signed the FAR form bond for Carlow, making the United States, and not the Tribe, the beneficiary.

Carlow, which had never constructed a dam, sub-contracted much of the work to Petitioner, FGS Constructors, Inc. (Petitioner or FGS), which had such experience. The Sub-Contract was to perform the key repair and reconstruction work on the dam gates and spillway to be accomplished by the ISDEAA Contract. The record shows FGS provided training to Indian contractor Carlow on

how to perform this kind of construction work through the performance of its contract duties.

The record shows the BIA exercised its discretion under the ISDEAA Contract and authorized "Modifications" of the ISDEAA Contract, expressly making the Tribe's Contracts with Indian contractors CCI (Modifications No. 6 and 7) and Carlow (Modification No. 9), "a part of the prime contract".

Pursuant to the terms of the ISDEAA Contract, the BIA provided over-all supervision of the dam re-construction project. CCI, on behalf of the Tribe, supervised Carlow. Under the control and supervision of employees and officials of the BIA and CCI, the work of Petitioner was immediately supervised by Carlow.

The BIA took additional steps to extend the liability blanket of the United States over the dam construction project by authorizing payment to the Bureau of Reclamation (BOR) to review and approve of the Dam's design work. According to BIA documents: "In this manner, he felt the tribe would be protected as the Bureau of Reclamation's review and approval would **make the U.S. government liable.**" (Emphasis added). Modification No. 1 to the Engineering Contract required that CCI request BIA and BOR participation in inspection and presentation of the "inverts of the outlet works" of the Dam.

The ISDEAA Contract required White Clay Dam be drained prior to BOR inspection "so that the conduits and gates are accessible and visible to facilitate the pre-design inspection." A drained lake was also the "site condition" specified in the Contract for the reconstruction work for which Carlow and Petitioner were hired.

On June 24, 1991, with the Dam still full, the Tribe gave Carlow a Notice to Proceed with its contract work, then FAXed FGS a copy, causing FGS to mobilize men and equipment to the dam site. There had been no effort by the BIA or CCI to drain the dam by that date, completely preventing any view of the gates the Petitioner was hired to repair or replace. This substantially prevented FGS from performing and caused delays in its performance of any of its subcontract work. Because FGS was issued a Notice to Proceed prior to the dam being drained to the Contract level, Petitioner suffered damages as its personnel and equipment sat idle.

The ISDEAA Contract required the Construction Contractor and Sub-Contractor to perform all work in "strict accordance" with the terms and specifications of the Contract. Petitioner, by its Sub-Contract, also agreed to assume all duties and obligations that the contractor assumed in the ISDEAA Contract, unless changed. Any changes were to be in a writing called a "Change Order", approved by Carlow, CCI, and the BIA.

According to the Plans and Specifications, once the contractor exposed a problem or changed site condition, the Contract permitted a "period not to exceed ten (10) working days from the time of problem exposure" for the inspection, evaluation and issuance of a change order to correct it.

Although the BIA and CCI knew of the necessity of draining the reservoir before the ISDEAA Contract work could begin, Change Order No. 1 (C.O. No. 1) was not signed by CCI and the BIA until August 2, 1991, some 38 days after Petitioner was given a Notice to Proceed. On

August 7, 1991, the day Carlow and Petitioner were actually issued C.O. No. 1, a meeting was held to resolve the problem of unnecessary delay in the issuance of change orders to ensure site conditions necessary for performance of the Self-Determination Contract. It was a meeting held between officials of the BIA, CCI, the Tribe, Carlow, and Petitioner.

The delay in authorizing C.O. No. 1 (June 24, 1991 to August 7, 1991) had drastic effects on Contract work and materially raised FGS's performance costs due to standby time, overtime costs, increased utility costs, costs due to weather, subsistence costs, and costs for financing and lost profits.

The dam was not to be drained to its lowest attainable level until September 19, 1991. It was still above Contract specifications. At that level, however, the dam was found to contain substantial silt, which covered the inlet gate structure and prevented inspection and determination of the problems Petitioner was hired to repair. Petitioner and Carlow first learned of this additional changed site condition, nearly three (3) months after Petitioner received the Notice to Proceed. However, records show the BIA had been aware of the silt problem since 1983. The failure of the BIA to disclose this condition, unreasonably delayed the request and issuance of what became Change Order No. 2. Administrative processing of C.O. No. 2 could already have been completed to allow for immediate silt removal as soon as the water level was sufficiently lowered, had the problem been timely disclosed. The harsh South Dakota winter which would hamper or impede the Petitioner's work was fast approaching, significantly increasing the unlikeliness of

FGS being able to complete its work within the Contract time allowed. CCI and the BIA refused to extend the contract completion time when C.O. No. 2, removing the silt from the dam's gate structure, added to Petitioner's contract duties.

C.O. No. 2, was requested by Petitioner on September 23, 1991. It was not approved by CCI and the BIA within the ten day contract limit, and not authorized until October 22, 1991.

Despite water levels higher than Contract specifications for the performance of certain work, CCI directed Carlow, who in turn directed FGS, to begin certain concrete work, stilling basin dewatering, drain cleaning, and removal of irrigation facilities by October 4, 1991. Carlow informed FGS that if such work was not started immediately, Carlow would by default terminate FGS. FGS promptly started this work despite the absence of a contractually mandated change order.

On October 8, FGS formally requested direction regarding sunken backfill and inoperable under-drains discovered when designated spillway slabs were removed. Spillway slab removal was necessary for some of the concrete work Petitioner was contracted to perform. FGS never received direction regarding the sunken backfill and inoperable under-drains from Carlow, CCI, or the BIA.

Petitioner was also damaged as a result of payments for work performed and costs incurred either being delayed or never authorized at all by CCI. The BIA failed to ensure that FGS was paid as per the provisions of the ISDEAA Contract.

On August 19, 1991, the Tribe, and principally CCI, refused to release any funds to Carlow to pay Progress Payment Estimate No. 2, a large part of which was compensation for FGS's work and expenses. Petitioner had by that point performed services and incurred costs in excess of $40,000.00 and had received only $6,608.00 in payments.

On September 7, 1991, Carlow asked for an interim pay request of $83,545.02 from CCI, including a billing of $79,566.29 for FGS. A substantial part of the $79,566.92 payment request was denied by CCI, and therefore the Tribe, though the work was performed and the expenses reasonably incurred. In turn, Carlow was unable and refused to pay FGS the balance due.

Evidence showed the Contract provisions and customary construction industry practice permitted the recording and accepting of costs under change orders in a manner which permitted a contractor to be paid upon being billed by his suppliers, so he could pay them. The custom and practice was rejected by Carlow when CCI, and therefore the Tribe, insisted on checks or receipts showing that FGS had already paid all suppliers before FGS could receive payment. Petitioner had no resources with which to comply with these unnecessary and unreasonable pre-conditions to payment.

On November 12, 1991, FGS was not only informed its "uncooperativeness" was causing coordination problems but also that most of its third payment request for services and costs was denied due to lack of proof it had already paid its suppliers. As a result of non-payment by Respondents, FGS was without funds to pay suppliers for

materials received on site, or pay other costs, and was unable to receive the benefits to which it was entitled under the Sub-Contract.

On November 13, 1991, pursuant to a Self-Determination Contract provision (which authorized suspension of work by a contractor who was not paid within 45 days), FGS notified Carlow it had no choice, financially or contractually, but to suspend operations until problems were resolved, namely: the breach due to cardinal change, defective specifications, delay in issuance of change orders, and particularly, failure to pay for work performed.

At the time FGS noticed its suspension of work, it had received $32,928.00 for work performed, despite a billed progress payment owing of $128,349.00. The bills remain outstanding.

On or about November 20, 1991, Petitioner was notified that its Sub-Contract was being terminated due to its suspension of work.

As a result of unpaid services and costs incurred in performance of the Self-Determination Contract and its Change Orders, Petitioner suffered $517,727.65 in damages, as alleged in the Complaint.

Seeking relief, Petitioner brought suit in the United States District Court for the District of South Dakota, against the United States under the Federal Tort Claims Act (FTCA) [28 U.S.C. 1346, et seq.] and the Indian Self-Determination and Education Assistance Act (ISDEAA) [25 U.S.C. 450m-1], for the negligent performance of the

ISDEAA Contract.[2] The District Court ultimately granted summary judgment in favor of the United States, determining that the United States was not liable for CCI's negligent performance of the ISDEAA Contract, since Petitioner failed to show both that CCI's Engineering Contract was itself a "Self-Determination" Contract and that CCI was an "Indian Contractor" within the meaning of 25 U.S.C. 450f. November 21, 1994 Memorandum Opinion, p. 10 (21a).[3]

The United States Court of Appeals for the Eighth Circuit affirmed. *FGS Constructors, Inc. v. Carlow, et al.*, 64

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[2] Where a contractual duty exists to supervise a federal construction project, liability will be imputed to the United States for negligent conduct under the Contract, *Block v. Neal, supra*, 460 U.S. at 299-300, 103 S.Ct. at 1094; *Bartek v. Bell-Galyardt & Wells, Inc.*, 629 F.2d 523, 529 (8th Cir. 1980), including unreasonable delays in the issuance of change orders and acting upon submittals for payment. *United States v. Rogers & Rogers*, 161 F.Supp. 132, 135-136 (S.D.Cal. 1958); *Ernst v. Manhattan Const. Co.*, 387 F.Supp. 1001 (S.D.Ala. 1974); *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397, 401-402 (Fla. 1973); *Miller v. DeWitt*, 208 N.E.2d 249, 275 (App.Ct.Ill. 1965).

[3] Neither the District Court nor the Court of Appeals elected to examine whether Carlow was an "Indian Contractor" for purposes of liability of the United States under 25 U.S.C. 450f. Nor did either lower Court examine whether the United States was liable for the negligent performance of the ISDEAA Contract by permanent employees of the BIA; or whether the exercise of contractual supervisory duties by BIA permanent employees independently imposed liability on the United States for their negligent performance of the Contract. The case should be remanded for the lower courts to determine these issues.

F.3d 1230 (8th Cir. 1995). These issues are the subject of the instant Petition.[4]

FGS also brought a diversity and federal contract action against Carlow and the Oberlitners (as sureties on the Payment Bond), under the Miller Act 40 U.S.C. 270a, et seq., for breach of contract. The District Court dismissed the contract action against Carlow and the Oberlitners by Order dated March 4, 1993, on grounds of comity and failure to exhaust Tribal Court remedies. See, *FGS Constructors, Inc. v. Carlow, et al.*, 823 F.Supp. 1508, 1511 (D.S.D. 1993). This decision was reversed by the United States Court of Appeals for the Eighth Circuit, holding the venue requirements of the Miller Act and the consent of Carlow and the Oberlitners by contract, made the Federal District Court, rather than the Tribal Court, the appropriate venue. *FGS Constructors, Inc. v. Carlow, supra*, 64 F.3d at 1233. FGS does not seek review of or raise those issues in this Petition.

Petitioner seeks the review and clarification by this Court, as to the interpretation of "Indian contractor" and the extent of FTCA protection of the United States for negligent performance of the ISDEAA contract by an Indian contract engineer, under 25 U.S.C. 450f. These were cases of first impression for both lower Courts and will be similarly a case of first impression for this Court as well.

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[4] The Court of Appeals also affirmed the District Court's denial of Motion to Amend the Complaint to include contract actions against the United States, CCI, and the Tribe, some six months before the scheduled trial date, despite an absence of any showing of actual prejudice. *Ibid*, 64 F.3d at 1235.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER CONGRESS INTENDED ITS AMENDMENT OF 25 U.S.C. 450f BY P.L. 101-512 TO EXTEND LIABILITY PROTECTION OF THE UNITED STATES TO "INDIAN CONTRACTORS" PERFORMING ISDEAA CONTRACTS, SUCH AS CCI, OR WHETHER FTCA PROTECTION IS LIMITED ONLY TO "TRIBAL ORGANIZATIONS" WHICH MAY THEMSELVES BE A PARTY TO ISDEAA CONTRACTS AS DEFINED BY 25 U.S.C. 450b(j).

The Indian Self-Determination Act, 25 U.S.C. 450b(j) [P.L. 93-638] defines a "self-determination contract" as a contract (or grant or cooperative agreement utilized under 25 U.S.C. 450e-1) "between a tribal organization and the appropriate Secretary".

The Court of Appeals correctly observed that the purpose of the ISDEAA was to promote the long-standing policy of the United States to encourage "self-determination" by Indian tribes. The lower Courts, without citing any authority, incorrectly found that under the Act, the federal government simply "supplies funding to a tribal organization", "giving" the tribe "control over the administration of federal programs benefiting Indians." *FGS v. Carlow, supra,* 64 F.3d at 1234. Indeed, 25 U.S.C. 450b(j) expressly states: "no contract . . . entered into under part A of this subchapter ("construction contracts") shall be construed to be a procurement contract."

The record in this case shows the BIA was substantially more involved in this ISDEAA Contract than funding, retaining and exercising final control over CCI's and

the Tribe's decisions regarding the hiring of contractors and subcontractors, whether the contracts of any contractors would be made "a part of" the ISDEAA Contract, resolution of any problems in the administration of the Contract, and any proposed changes in plans and specifications. For this dam project, the BIA supervised CCI's performance of the ISDEAA Contract.

The District Court also acknowledged that the ISDEAA did not define "Indian contractor" as used in 25 U.S.C. 450f. It noted the term is not used elsewhere in the ISDEAA. Memorandum Opinion, p. 8 (19a).

The evidence showed that CCI was a "100 percent Indian-owned firm". The District Court acknowledged that within the meaning of the Buy Indian Act, as interpreted by the Supreme Court in *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 610, 100 S.Ct. 1905, 1906 n.3 (1980), CCI "would be considered an **Indian contractor.**" (Emphasis added). 11/21/94 Memorandum Opinion, p. 8 (19a).

The District Court also observed the Act does define "Indian-owned economic enterprise" in 25 U.S.C. 450e(b)(2) and 450f(2) [more than 51% Indian owned]. The District Court found that CCI met the definition of an "Indian-owned economic enterprise" as defined by these ISDEAA statutes. However, since Congress did not use the term "Indian-owned economic enterprise", but used "Indian contractor", in P.L. 101-512, amending 25 U.S.C. 450f, the District Court reasoned, it must not have intended to extend FTCA liability "to enterprises such as Cooper (CCI)". *Ibid*, p. 9 (20a).

The District Court held that under the ISDEAA, an "Indian contractor is a tribal organization" which has

entered into a Self-Determination contract. This was affirmed by the Court of Appeals for the Eighth Circuit.

While noting that FTCA coverage was extended to tort claims "resulting from the **performance of functions**" under contracts "authorized" by the ISDEAA, P.L. 101-512, the Court of Appeals for the Eighth Circuit affirmed, holding the definition of "self-determination contracts" in 25 U.S.C. 450b(j) limited such contracts to "Tribal organizations" and therefore precluded "Indian contractors" from FTCA protection unless they were really a "Tribal organization" which "may itself enter into a self-determination contract." Since CCI could not, itself, enter into an ISDEAA contract as defined by 25 U.S.C. 450b(j), it was not an "Indian contractor" within the meaning of 25 U.S.C. 450f. Therefore, by enacting P.L. 101-512, Congress did not intend the liability of the United States to cover any Indian business performing an ISDEAA contract except the tribe itself. *FGS Constructors v. Carlow, supra,* 64 F.3d at 1234-1235.

Petitioner contends that there is no authority to support the holding of the lower Courts that liability protection by the United States under 25 U.S.C. 450f, as amended, was intended by Congress to be limited to employees of only "Tribal organizations" performing an ISDEAA contract. Indeed, Congress expanded FTCA protection to include employees of "Indian Contractors", such as CCI, while acting within the scope of their duties under the ISDEAA Contract.

The history of Congressional amendments of 25 U.S.C. 450f reflects an intent to continually assume and expand the liability protection of the United States for

ISDEAA contract performance. When originally enacted on January 4, 1975, Section 450f contained in sub-section (c) the authorization for a Secretary to require a tribe requesting an ISDEAA contract, "to obtain adequate liability insurance." P.L. 93-638, Title I, Sec. 102, 88 Stat. 2206. In 1987, Congress amended sub-section (c) and added a provision deeming a "tribal organization or Indian contractor" carrying out a contract or agreement to be a part of the Public Health Service, and its employees a part of the Service as well. Thus, the United States assumed liability for PHS employees, whether contractual or by agreement.

In a rider to the 1991 Appropriations Bill, P.L. 101-512, Congress further expressly expanded liability coverage by the United States under 25 U.S.C. 450f, to include employees of Indian Tribes, tribal organizations *and* "**Indian Contractors**", while performing "any" ISDEAA contract, whether the federal agency was the Department of Health or, as in this case, the Department of Interior.

The language of P.L. 101-512, makes clear that "[w]ith respect to **claims** resulting **from** the ***performance of functions***" under "any" ISDEAA contract, employees of any "***Indian contractor***", in addition to any "Indian tribe [or] tribal organization" would be deemed "part of the Bureau of Indian Affairs . . . **and its *employees* are *deemed part of the Bureau*** or Service **while *acting within* the *scope of* their *employment in carrying out* the *contract* . . . "** Such employees would be afforded "the full

protection and coverage of the Federal Tort Claims Act."[5] (Emphasis added). See, Historical and Statutory Notes to 25 U.S.C. 450f, as amended by P.L. 101-512. *FGS Constructors v. Carlow*, 823 F.Supp. 1508, 1514 (D.S.D. 1993); *Comes Flying v. United States*, 830 F.Supp. 529, 530 (D.S.D. 1993) (Liability of the United States rejected where employees working under contract with the Department of Housing and Urban Development, not the Departments of Interior or Health and Human Services).

As the Supreme Court expressed in *Mallard v. United States District Court of Iowa*, 490 U.S. 296, 109 S.Ct. 1814 (1989), "[i]nterpretation of a statute must begin with the statute's language." *Ibid*, 490 U.S. at 300, 109 S.Ct. at 1818.

With the explicit reference to three separate and distinct "Indian" entities including Indian contractors, it is without foundation for the lower Courts to hold that Congress meant only a "tribal organization" which could enter an ISDEAA contract was an "Indian contractor" for FTCA protection under 25 U.S.C. 450f. The intent of Congress as to the exclusion or inclusion of a person within the definition of "employee" under the FTCA was dispositive as to whether a claim against the United States could

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[5] The FTCA authorizes suit against the United States for the negligence or wrongful act or omission by any employee of the government. 28 U.S.C. 2674 and 28 U.S.C. 2679. The FTCA defines an "employee of the government" as:

> **[O]fficers or employees of any federal agency . . . and persons acting on behalf of a federal agency** in an official capacity, temporarily or permanently in the service of the United States, with or without compensation. (Emphasis added).

28 U.S.C. 2671.

be maintained. See, *United States v. Orleans*, 425 U.S. 807, 817, 96 S.Ct. 1971, 1977 (1976); *Logue v. United States*, 412 U.S. 521, 529, 93 S.Ct. 2215, 2220-2221 (1973). There would be no reason for Congress to use "Indian contractor" in P.L. 101-512, a term which no where else appears in the ISDEAA, unless it intended to expand FTCA coverage to employees of Indian contractors "carrying out the functions" of an ISDEAA contract, in addition to employees of a tribe or tribal organization performing similar or other functions of such a contract.

Such language contains no suggestion the liability protection of the United States was intended to be limited to signers of the original Self-Determination Contract as defined by 25 U.S.C. 450b(j).

The expansion by Congress of FTCA coverage by enacting P.L. 101-512 to include "Indian contractors" was understood by President Bush. In signing the 1991 appropriations Bill, which included P.L. 101-512, the President stated H.R. 5769 provides: "a permanent extension of coverage of the Federal Tort Claims Act to Indian **tribes, tribal organizations, *tribal contractors* and their employees.**" (Emphasis added).

> The Act includes permanent substantive legislation with respect to the Federal Tort Claims Act that is both fiscally irresponsible and also will undermine our efforts to foster the independence and autonomy of Indian Tribes and tribal organizations.
>
> The Act provides that Indian Tribes, tribal organizations **and Indian Contractors and their employees** shall be considered employees of the United States **with respect to claims arising**

> **from contracts**, grants, and cooperative agreements **authorized by the Indian Self-Determination and Education Assistance Act** . . .

Statement of President Bush upon signing H.R. 5769, 26 Weekly Comp.Pres.Doc. 1768 (Nov. 5, 1990), reprinted in 1990 U.S.C.C.A.N. 3283-4. See, *Comes Flying v. United States, supra*, 830 F.Supp. at 530 n.2 (President Bush expressed his "distaste" for the provision). The President expressed his plan to work with Congress "to repeal this provision". It has not been repealed.

There was no reference in the language of the Act or President Bush's understanding that extension of FTCA coverage was limited to only those Indian contractors who themselves signed an ISDEAA contract, but instead referred to all claims arising from performance of an ISDEAA contract.

Due to the lower Court's opinions, clarification is needed from this Court as to Congress's intent in using the term "Indian contractors" in extending liability coverage of the United States to those employees performing ISDEAA contracts, in addition to "tribes" and "tribal organizations", under 25 U.S.C. 450f, as amended by P.L. 101-512.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER BY MODIFICATION OF AN ISDEAA CONTRACT BY THE BIA TO INCLUDE AN ENGINEERING CONTRACT, LIABILITY OF THE UNITED STATES IS EXTENDED TO PROTECT EMPLOYEES OF THE ENGINEER UNDER 25 U.S.C. 450f, AS AMENDED, AND THE FTCA.

If there is a requirement, as determined by the lower Courts, that an Indian contractor's contract must be a

part of an ISDEAA contract for liability of the United States to arise under 25 U.S.C. 450f, the lower Courts erred in concluding that no such situation could or did exist in this case.

The District Court held that "mere attachment" of the CCI contract to the ISDEAA Contract "does not also make the Cooper contract a self-determination contract." Memorandum Opinion, p. 8 (19a). The Court of Appeals for the Eighth Circuit failed to address the issue.

The evidence in this case showed, however, that rather than "mere attachment", the BIA exercised its exclusive contractual authority and "modified" the ISDEAA Contract to include CCI's contract. Sub-part 100.36M(2)(d)(viii) of the Self-Determination Contract specified that the BIA had final approval of any "contract modification request **to make** the contract/subcontract a ***part of*** **the prime contract**". (Emphasis added). The BIA chose to exercise its discretionary authority and by Modifications No. 6 and 7, made CCI's Engineering Contract "a part of" the ISDEAA Contract.

Furthermore, the merged contracts involved the same subject matter – the performance of the dam reconstruction project under the Self-Determination Contract.

Petitioner contends express modification of the Self-Determination Contract to include the CCI and Carlow Contracts as part of the ISDEAA Contract, merged them into one larger ISDEAA Contract and extended FTCA coverage to employees of the Indian contractors.

Under South Dakota Supreme law:

> 'When **two or more instruments** are executed at the same time by the same parties, for the same purposes as **part of the same transaction**, the court must consider and construe the instruments as ***one contract.***' *GMS [Inc.] v. Deadwood Social Club, Inc.*, 333 N.W.2d [442,] at 444 [(S.D. 1983)](emphasis added in original). Moreover, it is **not critical** whether the documents were **executed** at exactly the **same time** or whether the **parties** to each agreement are **identical**. (Emphasis added).

Baker v. Wilburn, 456 N.W.2d 304, 306 (S.D. 1990).

The *Baker* Court then noted the language of Federal contract law:

> 'Where **several writings** are **connected by internal references to each other**, even if they were executed on different dates and were not among all of the same parties, they will constitute a **single contract** as long as they **involve** the **same subject matter** and prove to be **parts of the entire transaction**.' (Emphasis added).

Baker v. Wilburn, supra, 456 N.W.2d at 306 [quoting, *Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n*, 597 F.Supp. 709, 716 (E.D.Va. 1984)].

Here, the CCI Contract became a part of the ISDEAA Contract by the BIA's express modification of the Prime Contract. The CCI Contract thus became part of *the one* Self-Determination Contract creating privity of the Federal contract between CCI, the Tribe, and the BIA.

The merging of contracts made employees of CCI, "employees" of the BIA for performance of the White

Clay Dam Project. They were therefore not "independent contractors" excluded from coverage under the FTCA. *United States v. Orleans, supra,* 425 U.S. at 817, 96 S.Ct. at 1977; *Logue v. United States, supra,* 412 U.S. at 530.

Since the BIA had a direct contractual role in the day to day operation of the Project under the Self-Determination Contract, in addition to privity of contract, and was so directly involved in the supervision of this Project, employees of CCI would be "employees" of the federal government under the FTCA, as well as P.L. 101-512. See, *United States v. Becker,* 378 F.2d 319, 321-322 (9th Cir. 1967) (defendant subject to close supervision and control of Forest Service); *Wollman v. Gross,* 484 F.Supp. 598, 601 (D.S.D. 1980) (director of Agricultural Stabilization and Conservation Services is "employee" under FTCA since ASCS structure "has been recognized as a 'hierarchy of command' functioning as a government agency under the overriding authority and control of the Secretary of Agriculture and his appointees").

The United States contractually and operationally assumed liability for any negligent performance of the Self-Determination Contract by CCI. Such an interpretation of the ISDEAA Contract in this case is consistent with its purpose as expressed by the language of P.L. 101-512, regarding the extension of liability protection by the United States for the torts of "Indian Contractors" in the performance of ISDEAA contracts.

CONCLUSION

The lower Courts, in this case of first impression, have excluded non-governmental "Indian contractors", such as CCI, from liability coverage of the United States, under 25 U.S.C. 450f as amended by P.L. 101-512. Since these Courts have interpreted the statute seemingly contrary to the express language used by Congress in extending such FTCA coverage to "Indian contractors", in addition to "Tribes" and "tribal organizations" performing the ISDEAA contract, it is imperative for this Honorable Court to clarify and determine the intent of Congress. The lower Courts having failed to do so, it is also important for certiorari to be granted to clarify whether the BIA may by express modification of an ISDEAA contract, make an Indian contractor's contract a part of the ISDEAA contract and thereby make the Indian contractor's employees, employees of the BIA for purposes of FTCA coverage under 25 U.S.C. 450f, as amended.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1164

FGS Constructors, Inc., Appellant, v. Michael Carlow, doing business as Carlow Enterprises; Carole Oberlitner; Carl Oberlitner; United States of America; Bureau of Indian Affairs, Appellees.	*	Appeal from the United States District Court for the District of South Dakota.

Submitted: June 14, 1995

Filed: September 5, 1995

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and LOKEN, Circuit Judge

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BRIGHT, Senior Circuit Judge.

I. INTRODUCTION

FGS Constructors, Inc. (FGS) appeals the district court's granting of summary judgment in favor of the United States. In addition, FGS appeals the district court's granting of Michael Carlow's, Carole Oberlitner's and Carl Oberlitner's motions to dismiss, and denying FGS's motions to amend its complaint and to extend discovery. For the reasons that follow, we affirm in part and reverse in part.

II. BACKGROUND

This case arises from a renovation project of the White Clay Dam located on the Pine Ridge Indian Reservation. In 1989, the United States, through the Bureau of Indian Affairs (BIA), agreed to provide funding to the Oglala Sioux Tribe (Tribe) for repairs to the White Clay Dam, pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA). The Tribe contracted with Cooper Consultants, Inc. (CCI) to be the project engineer, and Michael Carlow d/b/a Carlow Enterprises (Carlow) to be the general contractors. These contracts were approved by the government. Carl and Carole Oberlitner provided Carlow with a surety bond pursuant to the Miller Act, 40 U.S.C. § 270a-d, guaranteeing Carlow's performance on the contract.

Carlow then hired FGS as a subcontractor to perform mechanical and structural work on the dam. FGS's responsibility was to perform the key repair and reconstruction work on the dam gates and spillway. FGS claims that problems arose during the performance of their contract. Generally, FGS asserts that the BIA and CCI failed

to perform their obligation of draining the dam which prevented FGS from performing its subcontract work on time and materially raised FGS's costs. FGS subsequently suspended work and requested payment for the work already performed. FGS claims that they have not been paid in full for the work that they have already performed.

FGS then brought a diversity action in federal district court against Carlow for breach of contract, against Carl and Carole Oberlitner for enforcement of Miller Act bonds, and against the government for negligence based on its violation of federal statutes and regulations and for the imputed negligence of CCI under the Federal Tort Claims Act (FTCA).

The district court issued two separate orders relevant to this appeal. First, the district court dismissed the contract action against Carlow and the Oberlitners on the grounds of comity and failure to exhaust tribal court remedies. Second, the district court granted summary judgment in favor of the United States, determining that the contract between CCI and the Tribe was not a self-determination contract and that CCI was not an "Indian contractor" within the meaning of the ISDEAA. Therefore, the district court determined that the United States was not liable for CCI's alleged negligent performance.

Additionally, FGS filed a motion to amend the complaint one and a half years after the original complaint was filed. The district court denied FGS's motion to amend on the grounds that it would increase the scope and complexity of the issues involved, require the parties to essentially start discovery from the beginning, severely prejudice the government and unduly delay the case.

This appeal followed.

III. DISCUSSION

A. Claims Against Carlow and the Oberlitners

The district court granted Carlow's and the Oberlitners' motions to dismiss. In granting the motions, the district court determined that due to comity concerns, FGS must first exhaust any tribal court remedies it had against Carlow and the Oberlitners. The district court concluded that, because this case arose out of a construction contract on the Pine Ridge Indian Reservation, with Indian and non-Indian parties, respect for the sovereignty retained by the Tribe dictates that the tribal courts be given the opportunity in the first instance to address FGS's claims. In addition, the district court ruled that Carlow and the Oberlitners waived the Miller Act venue requirement,[1] requiring suits in the federal court to be brought in the district in which the contract was to be performed and executed, by the language of the dispute resolution clause in the contract.

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[1] Section 270b of the Miller Act provides:

> Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

40 U.S.C. § 270b(b) (1988).

FGS concedes that the district court correctly concluded that federal venue could be waived by a valid forum selection clause or a dispute resolution clause in a contract. FGS argues, however, that no waiver occurred in the contract, or subcontract, in this case.

The contract between Carlow and FGS contained the following dispute resolution clause: "In the event there is any dispute between the parties arising out of this agreement, it shall be determined in the Oglala Sioux Tribal Court or other court of competent jurisdiction." App. at 193. FGS argues that the phrase "or other court of competent jurisdiction" expanded the venue options to include the federal district court in addition to the tribal court. FGS contends that pursuant to *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979), this contract clause should be enforced unless the appellees show that enforcement would be unreasonable under the circumstances.

We do not agree with the district court's determination that FGS must first exhaust its remedies in the tribal court. The contracting parties agreed that a plaintiff could sue either in the federal district court of South Dakota (a court of competent jurisdiction) or in the tribal court. By this forum selection clause, the Tribe agreed that disputes need not be litigated in tribal court. The district court, therefore, had no significant comity reason to defer this Miller Act litigation first to the tribal court. Indeed, while we agree with the district court that a federal court does not have exclusive jurisdiction over these Miller Act claims, it nevertheless is the usual forum for such claims and has a significant interest in determining the merits of the action.

The district court determined that the venue provision of the Miller Act, Section 270b(b), was a venue provision enacted for the benefit of defendants, like Carlow and the Oberlitners. The district court stated that "[f]ederal courts following the holding in *F.D. Rich Co.* [417 U.S. 116 (1974)] have held the statute to constitute a waiveable venue requirement and have recognized that the provision was enacted for the benefit of defendants in Miller Act actions. *See In re Fireman's Fund Ins. Co.*, 588 F.2d 93, 94-95 (5th Cir. 1979) (holding that the Miller Act venue requirement, enacted for the benefit of defendants, can be waived by a valid forum selection clause in a contract); . . . " Dist. Ct. Opinion dated March 4, 1993, at 6. The district court concluded that because Carlow and the Oberlitners moved to dismiss the federal claims against them, they had, in effect, waived any right to litigate the Miller Act case in federal court.

We disagree with this analysis. While the Miller Act venue requirement, requiring suits to be brought in the district where the contract was to be performed, served to benefit defendants and could be waived by defendants, these rules and requirements have no relevance to this issue. No provision in the agreement gave these defendants the right to override a plaintiff's choice of forum under the forum selection clause. Since Carlow and the Oberlitners agreed to be sued in the federal district court of South Dakota, those defendants are not privileged to force the dispute into the tribal court. Accordingly, we reverse the district court's order granting Carlow's and the Oberlitners' motions to dismiss.

B. Claims Against the United States

We review the granting of summary judgment de novo, applying the same standard as the district court. *Dillaha v. Yamaha Motor Co.*, 23 F.3d 1376, 1377 (8th Cir. 1994). Summary judgment is appropriate if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The district court granted summary judgment in favor of the government and against FGS, concluding that the United States was not liable for the alleged negligent performance of the self-determination contract by CCI. The district court determined that in order for FGS to impute CCI's negligence to the government pursuant to this act, FGS has to prove two elements: 1) that the contract between the Tribe and CCI was a self-determination contract under the ISDEAA; and 2) that CCI was an Indian contractor. The district court ruled that FGS failed to prove both of these elements.

FGS contends that under the ISDEAA, specifically Pub. L. No. 101.512, Title III, § 314, 104 Stat. 1959 (codified at 25 U.S.C. § 450f notes (Supp. IV 1992)), the government is liable for the alleged negligence of CCI because any claim against a tribe is deemed to be a claim against the United States. FGS argues that the district court erred, and the United States is liable for CCI's negligent performance of the self-determination contract because the contract was not simply "attached," but by express modification was included and became a component of the self-determination contract. FGS claims that

the United States was statutorily liable for CCI's negligent performance of the self-determination contract because CCI was an Indian contractor as described in the Indian Self-Determination and Education Assistance Act. We disagree.

ISDEAA, § 314 provides in part:

> [w]ith respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior- . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of there [sic] employment in carrying out the contract agreement: *Provided,* That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any **tribe, tribal organization, Indian contractor or tribal employee** covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act. . . .

(Emphasis added) Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1959 (codified at 25 U.S.C. § 450f notes).

The ISDEAA promotes the long-standing federal policy of encouraging Indian self-determination, giving Indian tribes control over the administration of federal programs benefiting Indians. Under a self-determination contract, the federal government supplies funding to a

tribal organization, allowing the tribal organization to plan, conduct and administer a program or service that the federal government otherwise would have provided directly. 25 U.S.C. § 450f, b(j).

In 1988, Congress amended the ISDEAA to allow recovery under the Federal Tort Claims Act for certain claims arising out of the performance of self-determination contracts. Congress acknowledged that the tribal governments, when carrying out self-determination contracts, were performing a federal function and that a unique legal trust relationship existed between the tribal government and the federal government in these agreements. Because of this relationship, Congress concluded that the federal government must provide liability insurance to the tribal government for self-determination contracts.

We agree with the district court's determination that CCI is not an Indian contractor under § 314. The ISDEAA limits the application of FTCA coverage to tort "claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975." Pub. L. No. 101-512, § 314, 104 Stat. 1959. The Act specifies that "a contract . . . entered into [part A of the ISDEAA] between a tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services . . . otherwise provided to Indian tribes and their members pursuant to Federal law" is a self-determination contract. 25 U.S.C. § 450b(j). Thus, by definition, the ISDEAA does not contemplate that a private party such as CCI can enter into a self-determination contract. As the

district court explained, the purpose and policy of the ISDEAA are best served if the term "Indian contractor" is limited to a tribe-related organization that may itself enter into a self-determination contract, not a private party such as CCI that has been retained to work on a project funded by a self-determination contract. Thus, CCI is not an "Indian contractor" within the meaning of § 314.

FGS also argues that the district court erred by denying its motion for leave to amend its complaint and by denying its request to reopen discovery. FGS sought to amend its complaint to include a contract action against the United States, reurge original district court jurisdiction over the contract claims against Carlow and the Oberlitners, and add CCI and the Tribe as named defendants in contract and negligence claims under the Miller Act, the FTCA, and the ISDEAA.

Whether to grant leave to amend pleadings lies within the sound discretion of the district court. *Fuller v. Secretary of Defense*, 30 F.3d 86, 88 (8th Cir.), *cert. denied*, 115 S. Ct. 583 (1994). Here, the district court's denial of FGS's motions to amend its complaint and to reopen discovery was well within its discretion. FGS's motions were filed approximately one and a half years after the original complaint was filed. Although the district court extended discovery several times, FGS's motions were filed almost two months after the discovery cut-off date and several weeks after the court's cut-off date for filing such motions. Therefore, we determine that the district court did not abuse its discretion in denying FGS's requests to amend its complaint and to extend discovery.

IV. CONCLUSION

Accordingly, we reverse the district court's granting of Carlow's and the Oberlitners' motions to dismiss. In addition, we affirm the district court's granting of summary judgment in favor of the United States and its denial of FGS's motions to amend its complaint and to extend discovery.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1164SDRC

FGS Constructors, Inc., Apellant, v. Michael Carlow, doing business as Carlow Enterprises; Carole Oberlitner; Carl Oberlitner; United States of America; Bureau of Indian Affairs, Appellees.	*	Appeal from the United States District Court for the District of South Dakota

JUDGMENT

(Filed Nov. 1, 1995)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part and reversed in part in accordance with the opinion of this Court.

September 5, 1995

A true copy.

ATTEST:

/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FGS CONSTRUCTORS, INC., Plaintiff, vs. UNITED STATES OF AMERICA, and the BUREAU OF INDIAN AFFAIRS, Defendants.	)	CIV. 92-5137 JUDGMENT (Filed Nov. 21, 1994)

The government filed a motion for summary judgment on September 6, 1994 (Docket #83). Plaintiff FGS filed a counter-motion for summary judgment on September 15, 1994 (Docket #95). Based upon the memorandum opinion filed on this date, it is hereby

ORDERED that the government shall have judgment against FGS.

IT IS FURTHER ORDERED that costs in the amount of $1888.15 shall hereinafter be taxed and inserted by the Clerk.

Dated this 21st day of November, 1994.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
CHIEF JUDGE

ATTEST:
WILLIAM F. CLAYTON, CLERK
by: Alice R. Raesly
Deputy Clerk
(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FGS CONSTRUCTORS, INC., Plaintiff, vs. UNITED STATES OF AMERICA, and the BUREAU OF INDIAN AFFAIRS, Defendants.	)	CIV. 92-5137 MEMORANDUM OPINION (Filed Nov. 21, 1994)

On September 6, 1994, the United States and the Bureau of Indian Affairs ("government") moved for summary judgment. Plaintiff FGS Constructors, Inc. ("FGS") filed a counter-motion for summary judgment on September 15, 1994.

PROCEDURAL HISTORY AND FACTS

This case arose out of an attempt to repair the White Clay Dam on the Pine Ridge Indian Reservation. The Oglala Sioux Tribe ("OST") entered into a contract with the government for the funding of the engineering and repair work to be done on the dam. The contract was executed pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"). Contracts executed pursuant ISDEAA are referred to as self-determination contracts. A contract authorized by ISDEAA is a self-determination contract. *Comes Flying v. United States*, 830 F. Supp. 529, 530 (D.S.D. 1993).

OST contracted with Cooper Consultants, Inc. ("Cooper") to perform the engineering work on the project. A written engineering contract to that effect was executed with Cooper. This contract was then sent to the contracting officer with the Bureau of Indian Affairs ("BIA"). The engineering contract was attached to the self-determination contract between OST and the BIA.

OST also hired Michael Carlow d/b/a Carlow Enterprises ("Carlow") as the general contractor for the project. Carlow in turn hired FGS as a subcontractor to do the mechanical and structural work on the dam. FGS originally brought suit against Carlow for breach of contract, against Carl and Carole Oberlitner for enforcement of Miller Act bonds, and against the government for negligence based on its violation of federal statutes and regulations and for the imputed negligence of Cooper under the Federal Torts Claims Act ("FTCA").

After the Court decided the government's motion to dismiss in this case, only one of FGS's claims remained. That claim was for the "negligence of the government's project engineer, imputed to the government through Public Law Number 101-512, § 314." *FGS Constructors, Inc. v. Carlow*, 823 F. Supp. 1508, 1511 (D.S.D. 1993). Specifically, FGS alleged "that the engineer acted negligently in failing to draw down the dam and in erroneously depicting the conditions of the dam below the surface of the reservoir." *Id.* at 1514.

In its response to the government's motion for summary judgment and in its counter-motion for summary judgment, FGS attempts to allege another cause of action which was not set forth in its complaint. It appears that

FGS now contends that the government itself was negligent in performing the self-determination contract because it caused an unreasonable delay in lowering the dam reservoir, in issuing change orders, and in approving progress payments.[1] The Court specifically set forth the claims which were pleaded by FGS in *FGS Constructors, Inc. v. Carlow,* 823 F. Supp. at 1511. The claim FGS attempts to present now was not one of them. The Court denied FGS's motion to amend its complaint. FGS cannot now circumvent that ruling by alleging this new claim in the summary judgment pleadings. Consequently, these new claims are not considered.

SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if it can be shown "that there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting Sys., Inc.,* 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458, 488 (1962). In determining whether summary judgment is appropriate, the facts and inferences are viewed in the light most favorable to the nonmoving party. The burden is placed on the moving party to establish both that there are no genuine issues of material fact and that

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[1] Even if these claims were properly pleaded, the Court finds that they are actually claims for breach of contract, and thus, this Court would not have jurisdiction. Contract claims with an amount in controversy of $10,000 or more are the exclusive jurisdiction of the claims courts. *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.,* 797 F.2d 668, 675 (8th Cir. 1986).

it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings. The nonmoving party must then set forth specific facts by affidavit or other evidence showing that a genuine issue of material fact exists.

In examining the evidence in summary judgment motions, the Court must apply the appropriate substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). In this case, the burden is a preponderance of the evidence. The Supreme Court has noted that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.' "[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). The nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts," *Matsushita*, 106 S. Ct. at 1356, and "[w]here the record as a

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[2] Plaintiff's statement on page 3 of its response to the defendants' motion for summary judgment that "summary judgment is an extreme and treacherous remedies [sic] is no longer supported by the trilogy of *Celotex*, *Matsushita*, and *Liberty Lobby*. The spirit of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970) (cited by plaintiff) has been overruled by the trilogy. Thus, summary judgment is no longer a remedy disfavored by the courts.

whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' *Id.*

According to Local Rule of Civil Procedure 56.1(C), a party opposing summary judgment must "respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record." FGS did not comply with this rule. Rule 56.1(C), Rule 56.1(D) provides that "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." Thus, all of the statements of undisputed material facts set forth by the government are accepted as true for purposes of the government's motion for summary judgment.

ISDEAA BACKGROUND

FGS contends that under the ISDEAA, specifically Public Law Number 101-512, Title II section 314 (section 314), the government is liable for the alleged negligence of Cooper. Section 314 provides in part as follows:

> With respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act . . . an **Indian tribe, tribal organization or Indian contractor** is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of their

> employment in carrying out the contract or agreement: *Provided,* That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any **tribe, tribal organization, Indian contractor or tribal employee** covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act. . . .

(Emphasis supplied.) Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (codified at 25 U.S.C.A. § 450f notes (West Supp. 1993)). The purpose of the ISDEAA is to promote Indian self-government by encouraging Indians to actively and meaningfully participate in beneficial federal programs. 25 U.S.C. § 450a; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 111 S. Ct. 905, 910, 112 L. Ed.2d 1112 (1991). In order to accomplish this goal, under the ISDEAA, a tribal organization can enter into a self-determination contract with government. *See* 25 U.S.C. § 450b(j); 25 U.S.C. § 450f. Through self-determination contracts, tribal organizations receive funds from the government with which to administer and plan programs for and services to Indians. *Id.* Thus, the government's role in planning, conducting, and administering programs and services is minimized.

In 1988, the government determined that some of the funding set aside for federal Indian programs was wrongfully being absorbed by indirect costs associated with self-determination contracts such as the procurement of liability insurance. *See* S. Rep. No. 274, 100th Cong., 2d Sess. 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2628.

The result of this determination was an amendment to the ISDEAA which required the government to obtain liability insurance for Indian tribes, tribal organizations, and tribal contractors performing under self-determination contracts. *See* Pub. L. No. 100-472, § 201(c)(1), 102 Stat. 2285, 2289 (1988). The purpose of this amendment was to guarantee financial stability for programs run under self-determination contracts. *See* 1988 U.S.C.C.A.N. at 2620.

In 1989, in order to comply with Public Law Number 100-472, Congress amended the ISDEAA to provide FTCA coverage to Indian tribes, tribal organizations, and Indian contractors for claims occurring only in 1990 which arose from self-determination contracts. *See* Pub. L. No. 101-121, § 315, 103 Stat. 701, 744 (1989). In 1990, Congress made the FTCA coverage set forth in Public Law Number 101-121 permanent by enacting section 314 which provided coverage for all future claims.

DISCUSSION

In this case, in order for FGS to impute Cooper's negligence to the government, FGS must prove two elements. First, it must prove that the engineering contract was authorized by the ISDEAA. The Court finds it was not so authorized and therefore it was not a self-determination contract under section 314. Second, even assuming that the OST-Cooper contract was a self-determination contract, nonetheless FGS must prove that Cooper was an Indian contractor. This second element would be mooted by the Court's finding that the contract

is was [sic] not a self-determination contract. Nonetheless, the Court will address the second issue.

I

The Engineering contract as a self-determination contract.

In its statement of undisputed material facts the government asserts that the United States and the OST were the only two parties to the self-determination contract. The government also states that "[t]he Oglala Sioux Tribe and Cooper Consultants, Inc. entered into a contract, separate and distinct from the self-determination contract the Oglala Sioux Indian Tribe had with the United States." While the Court might accept these facts as true, consistent with its assurance to counsel at oral argument, it does not rest its determination on plaintiff's failure to properly respond under Local Rule 56.1(D). Notwithstanding the Court's acceptance of the government's material facts as true, the Court has examined the record for summary judgment and concludes that the OST-Cooper contract was not a self-determination contract; therefore, summary judgment in favor of the government is proper.

Under section 314, in order to impute Cooper's negligence to the government, FGS must establish that Cooper was a **tribe, tribal organization, or an Indian contractor.** FGS contends that Cooper is an Indian contractor because Cooper is 100 percent Indian owned and it is a contractor. The government contends that an Indian contractor

means a tribal organization.[3] The ISDEAA does not define the term "Indian contractor." Thus, this Court must interpret the meaning of the term. In interpreting the term, the Court must bear in mind the general principle that waivers of sovereign immunity must be narrowly construed. As the court stated in interpreting section 314,

> A waiver of sovereign immunity by the United States must be strictly construed and may not be extended by implication. Here, it is clear that in the 1990 Act Congress waived sovereign immunity by allowing FTCA liability to attach to injuries arising out of certain contracts (more precisely, self-determination contracts) between U.S. government agencies and tribal organizations.

Comes Flying, 830 F. Supp. at 531. The Court finds the FGS's definition of the term "Indian contractor" is an attempt to paint with too broad a brush. The mere attachment of the Cooper contract to the OST self-determination contract does not also make the Cooper contract a self-determination contract.

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[3] In support of its position, the government cities the case of *A. Y. McDonald Supply Co. v. United States*, Civ. No. 92-3043 (D.S.D. March 29, 1994) (Jones, J.). In that case, the court ruled that although the contractor was Indian owned and thus, a minority contractor, the status of minority contractor does not make one an "Indian contractor" under section 314. The court held that "[i]t's the Court's view that within the context of the statute that the Tribe who is contracting with the federal government is the Indian contractor within the meaning of the statute." A.Y. McDonald was a bench ruling from which there was no appeal. It therefore is of limited authority.

II

Cooper as an Indian contractor.

The term "Indian contractor" as contained in section 314 has not been defined by Congress. The term Indian contractor has been defined within the meaning of the Buy Indian Act. Relying on a statement in a BIA bulletin, the Supreme Court, defined an Indian contractor as "a legal entity that is 100% Indian owned and controlled." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 100 S. Ct. 1905, 1906 n.3, 64 L. Ed.2d 548 (1980) (citing 20 BIAM Bull. 1 (March 3, 1976)). Apparently, Cooper would be considered an Indian contractor under this definition.

Although the ISDEAA does not define the Indian contractor, it does contain provisions which refer to Indian-owned economic enterprises. 25 U.S.C. § 450e(b)(2); 25 U.S.C. § 450f(2). An Indian-owned economic enterprise is defined as "any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: Provided, that such Indian ownership shall constitute not less than 51 per centum of the enterprise." 25 U.S.C. § 1452(e). Essentially, this definition is the same one the Supreme Court used in *Andrus* to define Indian contractor. It would be inappropriate for this Court to determine that the terms Indian contractor and Indian-owned economic enterprise have the same meaning under the ISDEAA. As the Supreme Court stated in *Russello v. United States*, "We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simply mistake in

draftsmanship." *Russello v. United States*, 464 U.S. 16, 104 S. Ct. 296, 300, 78 L. Ed.2d 17 (1983); *see also United States v. Yip*, 930 F.2d 142, 148 (2d Cir. 1991).

Thus, it appears that for purposes of the ISDEAA, the legislature intended to use the term "Indian-owned economic enterprise" when referring to an economic enterprise that is 51 percent Indian owned and controlled. For purposes of the ISDEAA, Cooper would not be an Indian contractor, it would be an Indian-owned economic enterprise. If Congress intended in section 314 to extend FTCA liability to enterprises such as Cooper, it could have easily used the broader term of Indian-owned economic enterprise, defined it in other broader terms, or simply have defined Indian contractor to include contracts such as was entered into between OST and Cooper.

In interpreting statutory language, a court must consider the context of the statute in which the language appears. *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 109 S. Ct. 278, 281, 102 L. Ed.2d 186 (1988). In this case, the context of the statute intended that Indian contractor is a tribal organization which has entered a self-determination contract. Under the ISDEAA, the only parties who could enter into one of these contracts or agreements with the government are Indian tribes, tribal organizations, or Indian contractor. According to 25 U.S.C. § 450h, grant agreements can be entered into with tribal organizations or tribes. According to 25 U.S.C. § 450f, a self-determination contract can only be entered into by tribal organizations. The Court might rationally speculate that the reason the legislature added the term Indian contractor was to differentiate between tribal organizations who

had entered into contracts and tribal organizations who had received grants.

The Court believes the purpose and policy of the ISDEAA supports the definition of Indian contractor as a tribal organization which has entered a self-determination contract. In construing a statute, it is proper to look to "the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 110 S. Ct. 997, 1001, 108 L. Ed.2d 132, (199). The government could be subjected to extensive liability if it were held liable for *any* 51 percent Indian contractor hired by OST If this happened the government would be forced to take a more active role in the selection and supervision of the contractors which the OST hired under the self-determination contracts. This would completely undermine the purpose of the ISDEAA which as stated above is to transfer control of programs and services for Indians from the government to the Indian people. 25 U.S.C. § 450a(b).

CONCLUSION

Based upon this memorandum opinion, the Court concludes that (1) the OST-Cooper contract is not a self-determination contract, and (2) in any event, Cooper is not an Indian contractor under section 314.

Defendant's motion for summary judgment is granted and plaintiff's counter-motion for summary judgment is denied. An order shall issue forthwith. Costs are to be assessed to defendants against plaintiff.

Dated this 21st day of November, 1994.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
CHIEF JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: /s/ Alice R. Raesly
Deputy Clerk

(SEAL)

Supreme Court, U.S.
FILED
MAR 11 1996
CLERK

(2)

No. 95-1102

In the Supreme Court of the United States

OCTOBER TERM, 1995

FGS CONSTRUCTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the Indian Self-Determination and Education Assistance Act, which renders the United States liable under the Federal Tort Claims Act for claims arising from "the performance of functions * * * under a contract, grant agreement, or cooperative agreement authorized by the * * * Act" by "an Indian tribe, tribal organization, or Indian contractor," extends the liability of the United States to liability on claims arising from the performance of subcontracts between an Indian tribe and a private party.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 64 F.3d 1230. The decision of the district court (Pet. App. 14a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on September 5, 1995. The petition for a writ of certiorari was filed on December 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1989, pursuant to the Indian Self-Determination and Education Assistance Act (the Self-Determina-

tion Act), 25 U.S.C. 450 *et seq.*, the United States, through the Bureau of Indian Affairs (BIA), entered a self-determination agreement with the Oglala Sioux Indian Tribe (the Tribe), agreeing to provide funding for the Tribe to repair the White Clay Dam, located on the Pine Ridge Indian Reservation. The Tribe hired Cooper Consultants, Inc. (CCI) to be the project engineer and Carlow Enterprises (Carlow) to be the general contractors. The contracts with CCI and Carlow were approved by the government. Carl and Carole Oberlitner provided Carlow with a surety bond, guaranteeing Carlow's performance on the contract. Pet. App. 2a. Carlow then hired petitioner, FGS Constructors, Inc., as a subcontractor to perform repair and reconstruction work on the dam gates and spillway. *Ibid.* Petitioner asserts that CCI failed to drain the dam fully, which delayed petitioner's performance of the subcontract, and that CCI failed to pay for completed work. See Pet. 6-10.

Petitioner brought suit in the United States District Court for the District of South Dakota against Carlow for breach of contract, against the Oberlitners for enforcement of the surety bond, and against the United States for negligence under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* Pet. App. 3a. Plaintiff's theory for suing the United States under the FTCA was that the Self-Determination Act allows petitioner to impute to the United States the alleged negligence of the engineering contractor hired by the Tribe. *Ibid.*

The district court granted summary judgment for the United States, holding that the Self-Determination Act does not permit tort claims against the United States for the alleged negligence of the parties with which the tribal organization subcon-

tracts. Pet. App. 24a-25a. Specifically, the district court concluded that the language of the Self-Determination Act authorizing tort claims against the United States arising from the performance of functions "under a contract, grant agreement or cooperative agreement authorized by the [Act]" by an "Indian tribe, tribal organization, or Indian contractor" provided FTCA coverage only for negligence by Indian organizations acting pursuant to self-determination contracts into which they had entered with the United States.[1] Pet. App. 24a. By statutory definition, the district court observed, a "self-determination contract" is one between the United States and an Indian tribal organization. Pet. App. 24a; 25 U.S.C. 450b(j), 450f. The Tribe's separate agreement with CCI was not and could not be a self-determina-

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[1] The Self-Determination Act provides, in relevant part:

> With respect to claims resulting from the performance of functions * * * under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975 * * * an Indian tribe, tribal organization, or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract * * * and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement[.] * * * [A]ny civil action * * * involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will * * * be afforded the full protection and coverage of the Federal Tort Claims Act.

Pub. L. No. 101-512, § 314, 104 Stat. 1959-1960.

tion contract. Pet. App. 21a. The district court also concluded that the CCI contract was "mere[ly] attach[ed]" to the self-determination contract between the United States and the Tribe, and that that attachment was insufficient to render the CCI contract a self-determination contract. Pet. App. 22a. Finally, the district court rejected petitioner's argument that CCI should be considered an "Indian contractor" within the meaning of the Act, solely because CCI is a firm owned by Indians. Pet. App. 25a. The court noted that under petitioner's proposed interpretation, "the government could be subjected to extensive liability" for the actions of subcontractors, forcing the United States closely to monitor and supervise such subcontractors. *Ibid.* This would "completely undermine the purpose of the [Self-Determination Act] to transfer control of programs and services for Indians from the government to the Indian people." *Ibid.*

The court of appeals affirmed. The court agreed with the district court's determination that "by definition, the [Self-Determination Act] does not contemplate that a private party such as CCI can enter into a self-determination contract." Pet. App. 9a. The court of appeals concurred with the district court's understanding of the statute's policy of promoting Indian self-determination, stating that "the purpose and policy of the [Act] are best served if the term 'Indian contractor' is limited to a tribe-related organization that may itself enter into a self-determination contract." Pet. App. 10a.

ARGUMENT

1. Petitioner contends (Pet. 13-19) that the Self-Determination Act extends the tort liability of the

United States to claims arising from torts allegedly committed during the performance of subcontracts to which the United States is not a party. That contention is contrary to the plain language of the Self-Determination Act. The Act limits FTCA coverage to tort "claims * * * resulting from the performance of functions * * * under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975." § 314, 104 Stat. 1959-1960. The Self-Determination Act authorizes only "self-determination contracts." 25 U.S.C. 450f.[2] Self-determination contracts are contracts between Indian tribal organizations and the federal government. 25 U.S.C. 450b(j) (a "self-determination contract" is "a contract * * * between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services * * * otherwise provided to Indian tribes and their members pursuant to Federal law"). Thus, under the Self-Determination Act, a "self-determination contract" can involve only two specified parties: a "tribal organization" and one of the Secretaries empowered to make such agreements.

Petitioner argues (Pet. 18) that, because Section 314 extends FTCA coverage to claims against an "Indian contractor" "under a contract * * * authorized by the Indian Self-Determination and Education Assistance Act of 1975," § 314, 104 Stat. 1959, it should be read to cover contracts involving "Indian

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[2] The Self-Determination Act also authorizes certain grants, 25 U.S.C. 450h, and extends FTCA coverage to actions under the attendant grant agreements, § 314, 104 Stat. 1959-1960. Such agreements are not at issue here.

contractors" "carrying out the functions" of a self-determination contract pursuant to a subcontract. There is no basis for that reading of the statute. The only contracts "authorized by" the Self-Determination Act are "self-determination contracts" with the United States. The lower courts therefore correctly concluded that a contractor is covered by Section 314 only if the contractor itself can be and is a party to a self-determination contract. Pet. App. 10a.

The legislative history underscores Congress's intent that only the federal government and a tribal governing body can be parties to a self-determination contract: "The term 'self-determination contract' means an *intergovernmental contract* that is not a procurement contract" between the United States and the tribal governments. S. Rep. No. 274, 100th Cong., 2d Sess. 18 (1987) (emphasis added). A contract between a private party and an Indian tribe cannot be a "self-determination contract," and therefore cannot give rise to FTCA liability under this definition.

The legislative history of an earlier version of the Section providing FTCA coverage also demonstrates that Congress meant the provision to cover only tribal organizations that enter self-determination agreements with the United States, not to extend to parties in the position of CCI. In discussing Indian health services funded by the Self-Determination Act, Congress stated that the FTCA would not cover "those [parties] with whom the tribal organization may contract." S. Rep. No. 274, *supra*, at 26-28. Thus, if a tribe enters a contract with a private physician to provide care to Indians, "[s]uch physicians are not employees of the United States: they are independent contractors" and "their acts of negligence cannot be imputed to the United States" under the

FTCA. *Id.* at 26. In this case, CCI, a private firm hired by the Tribe to provide engineering services, is in the same position as a private physician hired by a tribe to provide medical services.

2. Petitioner also argues (Pet. 20) that the government "'modified' the [self-determination] contract to include CCI's contract." The district court found that the contract between the Tribe and CCI was "mere[ly] attach[ed]" to the self-determination contract, such that the Tribe's contract with CCI was not part of the self-determination contract. That factual finding does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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